IN THE
INDIANA SUPREME COURT

Case No. 49A04-1305-CT-000267

PHYLLIS DODSON, as Special Administrator of the Estate of EBONI DODSON, Deceased.	)	Appeal from the Marion Superior Court II
Appellant,	)	
v.	)	Case No. 49D02-1009-CT-041815
SEVEN CORNERS, INC.	)	Hon. Judge Theodore M. Sosin
Appellee.	)	

PETITION FOR TRANSFER

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Question Presented on Transfer

Is the "going and coming" rule the proper rule to determine if an employer is vicariously liable for the actions of its employee when that employee negligently consumed alcohol to the point of intoxication as part of and within the scope of his employment and said intoxication was the proximate cause of a motor vehicle accident immediately after the employee left the subject business meeting?

Table of Contents

Table of Authorities

Background and Prior Treatment of Issues on Transfer

The Estate of Eboni Dodson (hereinafter, "Dodson") filed its complaint for damages against Defendants, Curt Carlson (hereinafter "Carlson"), Seven Corners, Inc. (hereinafter, "Seven Corners"), and one other defendant who has since been dismissed. The complaint alleged Seven Corners was vicariously liable for the actions of its employee, Carlson, via the theory of respondeat superior. The complaint also included counts for punitive damages against both Carlson and Seven Corners.

Seven Corners moved for summary judgment on all counts. The trial court granted summary judgment in favor of Seven Corners on all counts. Dodson filed her appeal with the Indiana Court of Appeals. The Court of Appeals affirmed the judgment of the trial court. The Court of Appeals found no designated evidence that would suggest Carlson was outside the "going and coming" rule. As the Court of Appeals affirmed summary judgment in Seven Corner's favor, it did not address the punitive damages issue.

ARGUMENT

Dodson requests transfer to the Indiana Supreme Court. This request is based on three separate considerations governing the grant of transfer: the facts of this case present an undecided question of law in Indiana, the precedent applied by the lower courts is not proper for the facts of this case and therefore is in need of reconsideration as applied, and finally the precedent as applied to the facts of the case at bar is in conflict with the Indiana Supreme Court standard for vicarious liability of an employer via the theory of respondeat superior.

Brief Summary of Relevant Facts

Carlson consumed alcohol to the point of intoxication at what was undoubtedly a business meeting. Carlson attended the meeting as the vice president of sales of Seven Corners. Also at the meeting were his employer and president of Seven Corners, Jim Krampen and a current client of Seven Corners. The meeting was held at the Renaissance Hotel in Carmel, Indiana. The purpose of the meeting was to discuss a new business venture between Seven Corners and the existing client. (Appellant's App. at 35). It was common for Seven Corners to have business meetings at this hotel over dinner and drinks. (Appellant's App. at 45). At the business meeting, Carlson consumed alcohol to the point of intoxication. Approximately fifteen to twenty minutes after the meeting was over, Carlson was involved in a motor vehicle accident that claimed the life of Eboni Dodson. (Appellant's App. at 46). Carlson was arrested on suspicion of operating a vehicle while intoxicated after he registered a .12 on an alcohol breath test machine. (Appellant's App. at 48).

A. Undecided Question of Law

Both the trial court and the Court of Appeals have acknowledged either directly or indirectly that there are no Indiana cases on point.

The trial court noted in its order granting summary judgment, "[i]t is assumed from the case citations of the parties that Indiana case law has not addressed a circumstance involving an employee consuming alcohol within the course of [sic] employment, and then immediately engaging in a non-employment related activity, such as driving home." (Appellant's App. p. 12-13).

The Court of Appeals cited two out of state cases to support its decision to affirm the trial

court, *Cunningham v. Petrilla*, 817 N.Y.S.2d 468 (App.Div. 2006) from the state of New York and *Bell v. Hurstell*, 743 So.2d 720 (La. Ct. App. 1999), *writ denied,* 748 So.2d 1165 (La.1999) from Louisiana.

The Court of Appeals cited to one Indiana case involving an intoxicated employee allegedly within the scope of employment, *Dillman v. Great Dane Trailers, Inc.*, 649 N.E.2d 665 (Ind. Ct. App. 1995). This case is easily distinguishable because the employee did not drink to the point of intoxication within the scope of his employment. He consumed alcohol on what was clearly his personal time and then caused a collision on his way to work. *Id.* at 667.

The heart of the case at bar is the fact that Carlson consumed alcohol to the point of intoxication within the scope of his employment with Seven Corners. This is a different question of law. There are no Indiana cases addressing this question of law.

B. Indiana Precedent as Applied by the Court of Appeals is in Need of Reconsideration

Indiana follows the "going and coming" rule as set out in *Biel* and its progeny, *Biel, Inc. v. Kirsch,* 240 Ind. 69, 161 N.E.2d 617, (1959). The "going and coming" rule basically says that an employee is not within the scope of his employment when he is going to work or leaving work. In *Biel*, the employee struck a motorcyclist on her way to work. The injured motorcyclist brought suit against the employer alleging vicarious liability. This Court said:

> An essential part of the proof necessary to hold the appellant corporation liable was that Ethel H. Biel, at the time and place of the accident, was the appellant's corporate agent, acting within the scope of her employment and authority for and on behalf of the corporation as her principal; otherwise no negligence may be imputed to the appellant corporation.

Id. at 618. The Court of Appeals emphasized and relied on the language "at the time and place of the accident" to support its holding that Carlson was not outside the "going and coming" rule and

therefore Seven Corners was not vicariously responsible for its employee's actions.

In a vacuum, yes, "at the time and place of the accident" Carlson was not working for Seven Corners, but we do not live in a vacuum and our case law should reflect that reality. Carlson's intoxication did not magically stop because the business meeting was over. His intoxication and therefore the scope of his employment carried over to his drive home. Trying to fit the facts of the case at bar into the "going and coming" rule to make everything neat, tidy and easy is not justice.

This case is not a *Biel* case. *Biel* and its progeny are distinguishable from the instant case because the analysis of those cases focus on the act of driving alone and not on the negligent consumption of alcohol which occurred within the scope of employment. It takes an act of intellectual gymnastics to separate the consumption of alcohol to the point of intoxication within the scope of employment and the effects of that intoxication immediately thereafter on Carlson's drive home from the meeting.

Several other jurisdictions have recognized these facts and have adopted a different rule so as to not damage or abrogate the "going and coming" rule. *See Dickinson v. Ersel, et al*, 716 P.2d 814 (Wash. 1986), *Slade v. Smith's Management Corporation,* 808 P.2d 401 (Ida. 1991), *Chastain v. Litton Systems, Inc.,* 694 F.2d 957 (4th Cir. 1982) *writ of certiori denied* (462 U.S. 1106)(1983) and *Purton v. Marriott International, Inc.,* 218 Cal. App.4th 499 (2013). These cases are discussed in Dodson's Appellant's Brief. (Brief of Appellant, 15-20). These cases appropriately shift the focus from whether the employee was in the scope of his employment "at the time and place of the accident" to when the employee negligently consumed alcohol to the point of intoxication. This shift of focus is appropriate and it allows the "going and coming" rule

to remain intact while at the same time recognizing the responsibility of the employer when the employee negligently consumes alcohol within the scope of his employment.

The cases cited in Dodson's brief almost all involve various forms of parties and/or celebrations hosted by the employer. A critical factual question in those cases is whether or not the party was held to further the employer's business interest in some way. The case at bar is much factually stronger than the "party" cases. It is undisputed that Carlson was attending a business meeting that furthered his employer's business interests. The parties came to an agreement and Carlson was made the point man on the new business deal. (Appellants' App at 44).

All these jurisdictions adopted simple multi-part tests to determine if the employee negligently consumed alcohol within the scope of his employment, and, if so, was the resulting intoxication the proximate cause of the subsequent accident. These tests appropriately put the injured party's claim in the hands of the fact finder as opposed to an antiquated rule that does not fit the fact scenarios.

The "going and coming" rule is not an appropriate test of Seven Corners' vicarious liability in this situation.

C. The "going and coming" Rule as Applied by the Court of Appeals Conflicts with the Indiana Supreme Court Standard for Vicarious Liability of an Employer as Set Forth in *Barnett*

In *Barnett,* this Court set out the standard for the vicarious liability of an employer.

> The general rule is that vicarious liability will be imposed upon an employer under the doctrine of respondeat superior where the employee has inflicted harm while acting within the scope of employment. And in order for an employee's act to fall within the scope of employment, the **injurious act must be incidental to**

> **the conduct authorized** or it must, to an appreciable extent further the employer's business.

Barnett v. Clark, 889 N.E.2d 281, 285 (Ind. 2008)(emphasis added)(internal citations omitted).

Carlson was arrested upon suspicion of operating a vehicle while intoxicated after colliding with the vehicle in which Eboni Dodson was seated. Carlson had just left a business meeting with the president of his company and a business partner. It was a common practice for them to have business meetings over dinner and drinks. (Appellant's App. at 45). The meetings over dinner and drinks were a part of his job.

It is inconsequential to this analysis if the "injurious act" is considered to be the negligent consumption of alcohol at the business meeting or the resulting accident while driving intoxicated. Both are clearly "incidental" to the conduct authorized. As such, according to *Bennet*, this act falls within the scope of his employment.

"Incidental" is defined by the Meriam-Webster dictionary as "being likely to ensue as a chance or minor consequence." Driving while intoxicated is certainly "incidental" to courting new business over "dinner and drinks."

This Court's standard for the vicarious liability of an employer for his employee's actions and the "going and coming" rule are at odds when applied to the facts of this case. It is necessary to clarify these conflicting standards.

CONCLUSION

The Court should grant transfer, vacate the opinion of the Court of Appeals, and remand to the trial court for further proceedings.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Petition contains no more than 4,200 words.

Ryan K. Johnson

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following via United States mail, proper postage affixed, this 25th day of August, 2014.

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